No. 85-1517

In The

Supreme Court of the United States

October Term, 1985

THE STATE OF COLORADO,

Petitioner,

vs.

JOHN LEROY SPRING,

Respondent.

On Certiorari to the Supreme Court of the State of Colorado

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

1. Does a valid waiver of the right to silence and the right to counsel necessarily require that the defendant be aware, prior to interrogation, of all of the possible subjects of interrogation?

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OPINIONS BELOW

The trial court's unreported ruling is included in the Petition for Writ of Certiorari as Appendix A; the Colorado Court of Appeals' opinion is reported as *People v. Spring*, 671 P.2d 965 (Colo. App. 1983); the opinion of the Colorado Supreme Court is reported as *People v. Spring*, 713 P.2d 865 (Colo. 1985).

JURISDICTION

The judgment of the Colorado Supreme Court was issued on October 2, 1985. The state's timely Petition for Rehearing was denied on January 13, 1986. The Colorado Supreme Court did not rely on any independent state ground, but based its decision upon *Miranda v. Arizona*, 384 U.S. 436 (1966), and subsequent cases applying *Miranda*. The Petition for Certiorari in this case was filed on March 14, 1986, and granted by this Court on May 5, 1986. This Court has jurisdiction over this matter pursuant to 28 U.S.C. section 1257 and S. Ct. Rules 17.1(b) and (c).

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CONSTITUTIONAL PROVISIONS

Amendment V of the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.

Amendment XIV, section 1 of the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

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STATEMENT OF THE CASE

In early February of 1979, the respondent John Spring and his friend Donald Wagner invited a man named Donald Walker to accompany them "elk hunting" in the snowy mountains west of Craig, Colorado. The respondent had mentioned to a friend several times that he was planning to kill Walker (ff. 3351-3353).[1] He and Wagner believed that Walker was a "snitch." In addition, Walker had dated the respondent's wife while the respondent was in prison (ff. 3351-3353).

The three men drove to a remote area and left Wagner's van. Wagner was carrying a rifle and the respondent, a flashlight (f. 3306). The fact that the respondent was wearing only a denim jacket, jeans and sneakers for a night of elk hunting in the wintry mountains apparently did not arouse Walker's suspicions (ff. 3232, 3302, 3314, 3392). Wagner told Walker to go along the road ahead of him, look into a ravine, and pick an elk (f. 3315). Walker did so, and asked the respondent to shine the flashlight into the ravine, but Wagner ordered him to shine it on Walker. When the respondent did, Wagner shot Walker in the head (f. 3317). The respondent was startled and dropped the flashlight, because he did not know that Wagner was going to kill Walker so close to the road (ff. 3198-3200). When Walker made a little choking noise, Wagner shot him a second time; he and the respondent then dragged the body to a ditch and kicked snow over it (ff. 3321-3323). The respondent commented that he was glad Wagner had

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[1]The record will be referred to by the folio numbers which appear in the left margin of each page of the record.

killed Walker, as he (the respondent) had been trying to "get rid of him" for awhile (f. 3186). Although the respondent claimed at trial that he did not plan the murder and aided Walker afterwards only through fear that Walker would kill him as well, he was impeached by his earlier admission to a Colorado police officer that he *did* know that night that Wagner was planning to kill Walker (ff. 3036-3037).

The respondent and Wagner bragged about their deed to another friend, George Dennison, who later proved to be an informant working with agents of the Federal Bureau of Alcohol, Tobacco and Firearms (ATF). (f. 2724). The respondent told Dennison that they did not have to worry about Walker anymore, and that it had felt good to kill him (ff. 2724, 2733). He later reiterated that he had no bad feelings about killing Walker, because he had spent two or three years thinking about it and now could relax (Defendant's Exhibit TC). Dennison related this information (as well as other information concerning illegal gun transactions) to the ATF agents.

On March 30, 1979 the respondent was arrested by ATF agents on federal firearms charges, and was twice advised of his constitutional rights. In addition, he was advised that if he decided to answer questions without the assistance of an attorney, he had the right to stop the questioning at any time or to stop until the presence of an attorney could be secured (ff. 200-201; People's Exhibit J). The respondent was not specifically advised that he might be a murder suspect. He signed a written waiver form, and was then interrogated concerning the firearms violations. Toward the end of this interrogation, the respondent was asked if he had a criminal record. He replied that he had a juvenile record, acquired at the age of 10 when he killed his aunt. The agent then asked if he had ever shot anyone else. The respondent ducked his head and mumbled, "I shot another guy once." When the agent asked if he had ever been to Colorado, the respondent replied, "No." Finally, the agent asked whether he had shot a man named Donnie Walker west of Denver and thrown the body in a snowbank. After a long pause, the respondent ducked his head and said, "No." (ff. 206-208).

On May 26, 1979, the respondent made a statement to Colorado authorities in which he outlined his involvement in the murder, and admitted that he had known that Wagner planned to kill Walker that night (ff. 3036, 3037). A third statement, in which he admitted to ATF agents that it was he who had talked Walker into leaving his gun behind in the van, was made on July 13, 1979 (ff. 2970, 2986).

The trial Court initially ruled that the first statement was admissible (f. 280). However, during trial, the Court decided that only that part of the statement where the respondent denied shooting Walker was of sufficient relevance to be admissible.[2] The latter two statements were

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[2]The prosecution chose not to use this denial at trial. However, if a retrial of this case proves necessary, the statement may be needed. In addition, the respondent's Brief in Opposition to Petition for Writ of Certiorari argues that, since the first statement was obtained by "improper tactics" rather than a simple failure to administer *Miranda* warnings, then *Oregon v. Elstad*, 105 S. Ct. 1285 (1985) does not apply, and the second statement must be presumed to be tainted by the first. Thus, the constitutional validity of the first statement is very much a live issue.

admitted at trial, and the respondent was convicted of first-degree murder.

On appeal, the Colorado Court of Appeals reversed the respondent's conviction, finding that the respondent's statements of March 30, 1979 and July 13, 1979 were obtained in violation of *Miranda*, and that his May 26, 1979 statement was tainted by the March 30, 1979 *Miranda* violations. The Colorado Supreme Court, while reserving ruling on the taint issue, affirmed the court of appeals on the matter of *Miranda* violations. With respect to the March 30, 1979 statement, the Court held that although the police have no specific duty to advise a suspect of the subject of interrogation, unless the evidence shows that the suspect knows at least the general nature of the crime involved from *some* source, then the waiver of rights has not been shown to be knowing, intelligent and voluntary. With respect to the July 13, 1979 statement, it held that the authorities had improperly continued to question the respondent after he had made ambiguous remarks which could have indicated a reluctance on his part to talk further.[3]

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[3]The July 13, 1979 statement was made to ATF agents after an information charging the respondent with murder had been filed in Colorado, and he had entered a plea of guilty in the federal firearms case. The agents advised him again of his *Miranda* rights and warned him he could stop their questioning at any time. The respondent stated that he would not sign a waiver form without his attorney. Without another word, the agents closed their clipboards and stood to leave. The respondent stopped them, saying he knew his rights, he did not want to sign anything, but he did want to talk with them. The agents then resumed the interview. (The respondent has never challenged the validity of his waiver of the right to counsel.)

The respondent was told that if he wanted to answer questions that was fine, but that he did not have to. He replied that

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Certiorari review was granted by this Court to consider whether a valid waiver of the right to silence and the right to counsel requires that the suspect be aware prior to interrogation, of all of the possible subjects of interrogation.[4]

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he understood that. On the topic of the Walker murder, several questions were not answered, several were answered with a shrug of the shoulder, and once or twice he replied, "I don't want to talk about that." Each time the respondent said he would rather not talk about "that," the agents went on to a different question, which the respondent readily answered. Questions which the respondent refused to answer were not asked again. In the course of that discussion, the respondent revealed that he had talked Walker into leaving Walker's gun in the van, and that he had been carrying Walker's gun when arrested on the federal gun charges.

[4]This issue concerns only the March 30, 1979 statement. It does not concern whether the July 13, 1979 statement was improperly obtained, a matter which the Colorado Supreme Court found to be reversible error in and of itself.

With respect to the July 13, 1979 statement, the Colorado Supreme Court ruled that once a suspect indicates *in any way* that he does not wish to answer a question, the interrogating officers have an "affirmative and emphatic duty" to determine whether the suspect is exercising his privilege against self-incrimination in all respects or is merely reluctant to answer the particular question. The impact on the State of Colorado, which will be required to retry this case even if successful on the issue on which certiorari has been granted, warrants this Court's addressing this additional issue also, even if summarily. S. Ct. Rule 34.1(a); *See Batson v. Kentucky*, 106 S. Ct. 1712 (1986) (Stevens, J. concurring); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Illinois v. Gates*, 462 U.S. 213 (1983). The issue is one of great importance, and can be expected to recur often, *Cf. Smith v. Illinois*, 105 S. Ct. 490, 493 n. 3 (1984). A significant body of case law supports the conclusion that the conviction here for this most serious of crimes should not have been reversed on this basis. *E.g. Vail v. State*, 599 P.2d 1371 (Alaska 1979); *Reeves v. State*, 241 Ga. 44, 243 S.E.2d 24 (1978), *cert. denied* 439 U.S. 854; State v. Nichols,

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ARGUMENT

A VALID WAIVER OF THE RIGHT TO SILENCE AND THE RIGHT TO COUNSEL DOES NOT REQUIRE THAT A SUSPECT BE AWARE, PRIOR TO INTERROGATION, OF ALL OF THE POSSIBLE SUBJECTS OF INTERROGATION.

The premise underlying the Colorado Supreme Court's opinion is that a suspect in custody who has been properly advised of his *Miranda* rights, but does not know that he is also suspected of crimes other than those for which he was arrested, cannot make a knowing and intelligent waiver of his fifth amendment rights.

In *Miranda v. Arizona,* 384 U.S. 436 (1966), this Court recognized that custodial interrogation often generates compelling pressures which work to undermine a criminal suspect's will to resist and may compel him to speak. In order to protect the fifth amendment rights of criminal suspects and to ameliorate the compulsion inherent in custodial investigation, *Miranda* imposed upon the police

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212 Kan. 814, 512 P.2d 329 (1973); *State v. Perkins,* 219 Neb. 491, 364 N.W.2d 20 (1985); *Lamb v. Commonwealth,* 217 Va. 307 227 S.E.2d 737 (1976); *See also State v. Padilla,* 101 Idaho 713, 620 P.2d 286 (1980); *State v. Bradfield,* 29 Wash. App. 679, 630 P.2d 494 (1981). *See also Fare v. Michael C.,* 442 U.S. 707, 727 (1979) ("At some points [the suspect] did state that . . . he could not, or would not, answer the question, but these statements were not assertions of his right to remain silent"); *compare* the approach of the Colorado Supreme Court, prior to the instant case, in *People v. Roark,* 643 P.2d 756 (Colo. 1982) ("(H)ad the defendant wished to terminate all further interrogation, he easily could have done so by simply stating that he did not want to answer any further questions.")

an absolute duty to follow certain procedures prior to interrogation. Accordingly, the police must advise the suspect that he has the right to remain silent and the right to counsel, and that if he cannot afford an attorney, one will be appointed for him. The police must also warn the suspect that anything he does say can and will be used against him. 384 U.S. at 468-470.

The respondent does not suggest that the ATF agents here failed to follow the dictates of *Miranda.* Rather, he argues that his waiver was not made knowingly and intelligently because he did not know that the ATF agents were aware of the Colorado murder; their failure to inform him that they suspected him of the murder as well as the gun charges deprived him of information necessary to a knowing and intelligent waiver of his fifth amendment rights. This argument finds no support in the prior decisions of this Court.

Miranda provides that a suspect may waive his fifth amendment rights. 384 U.S. at 444-447. This waiver must be an intentional and voluntary relinquishment of a known right. *Johnson v. Zerbst,* 304 U.S. 458 (1938). A *Miranda* waiver is voluntary when it is the product of a free and deliberate choice rather than intimidation, coercion or deception; it is knowing and intelligent when it is made with a full awareness of the nature of the right being abandoned and the *consequences* of the decision to abandon it. *Moran v. Burbine,* 106 S. Ct. 1135 (1986); *Fare v. Michael C.,* 442 U.S. 707, 725 (1979).

In its decision, the Colorado Supreme Court reasoned that a knowing and intelligent waiver of *Miranda* rights must be supported by actual knowledge of the

charges, because the *consequences* of waiver will vary considerably, depending on the severity of the charges. The Court wrote:

> It is a far different thing to forego a lawyer where a traffic offense is involved than to waive counsel where first-degree murder is at stake.

People v. Spring, 713 P.2d 865, 873 (Colo. 1985), (quoting *Commonwealth v. Collins*, 436 Pa. 114, 259 A.2d 160, 163 (1964)). The Colorado Supreme Court assumed that the "consequences" referred to by this Court constitute *all* of the possible legal and factual consequences that a waiver of rights might produce in the suspect's life.

The Colorado Supreme Court has misconstrued the nature of the consequences which a suspect must understand. *Miranda* clearly stated the exact "consequences" of which the suspect must be made aware:

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in Court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of *these consequences* that there can be any assurance of real understanding and intelligent exercise of the privilege.

384 U.S. at 436 (emphasis added). Clearly, the suspect need not be aware of *all* of the possible legal and factual consequences of waiver, but only of the consequence that his statement can and will be used against him. The consequences of which the suspect must be aware are the same whether the charge is a traffic offense or first-degree murder.

In recent cases, criminal defendants have argued to this Court that their waivers of fifth amendment rights were not knowing and intelligent, because the police, although fully advising them of their *Miranda* rights, failed to furnish important additional information. In *Oregon v. Elstad*, 105 S. Ct. 1285 (1985), the defendant argued that he was unable to give a fully informed waiver because he was unaware that a prior incriminating statement made by him would ultimately be held inadmissible. In *Moran v. Burbine, supra,* the defendant argued that his waiver was invalid because the police failed to inform him that an attorney had telephoned and offered to represent him. These arguments were firmly rejected by this Court. In *Elstad*, this Court wrote that it

> has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness. (citations omitted) . . . Thus we have not held that the *sine qua non* for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the consequences flowing from the nature and the quality of the evidence in the case.

105 S. Ct. at 1297-98. In *Moran v. Burbine*, the Court commented:

> Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right . . . No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self interest in deciding whether to speak or stand

> by his rights. [citations omitted]. Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

106 S. Ct. at 1141-42.

It is clear that a knowing and intelligent waiver does not require that the suspect know all of the information which a careful attorney would demand before determining whether waiver would be the wisest course of action under the circumstances. *United States v. Anderson,* 533 F.2d 1210 (D.C. Cir., 1976); *Cf. United States v. Washington,* 431 U.S. 181 (1977). It is not in the sense of shrewdness or wisdom that *Miranda* speaks of an intelligent waiver, but in the sense of understanding constitutional rights; whether a waiver is, under the circumstances, wise or foolish is constitutionally irrelevant. *Harris v. Riddle,* 551 F.2d 936 (4th Cir. 1977), *cert. denied* 434 U.S. 849; *Collins v. Brierly,* 492 F.2d 735 (3rd Cir. 1974), *cert. denied* 419 U.S. 877.

The language and purpose of the fifth amendment support this conclusion. The fifth amendment states that no person shall be *compelled* to be a witness against himself in a criminal case. U.S. Const. Amend. V. It does not state or infer that a suspect shall not be permitted to confess, only that the state may not force him to do so. *State v. McKnight,* 52 N.J. 35, 243 A.2d 240 (1968). The amendment was meant to protect suspects from police overreaching, not from their own moral standards, miscalculations, or ignorance. *Oregon v. Elstad, supra.* The

respondent's arguments below, and the Colorado Supreme Court's opinion, have inferred that this is somehow unfair, but, in fact, it is no more unfair, unlawful, or unconstitutional to use a statement unwittingly or foolishly made by a warned defendant than it is to use clues found at the scene of the crime which a brighter, better informed, or more artful criminal would not have left. *State v. McKnight, supra.*

Perhaps the most basic purpose of government is to provide law and order, to protect its citizens from criminal attack in their homes, in their work, and in the streets. *State v. McKnight, supra,* at 250. The Constitution was never meant to thwart that aim; it does not shield criminals from zealous investigation and resolute prosecution, and it does not make the criminal law a game, where both sides must be given an equal opportunity to win. Assuming always that a suspect (if in custody) has been warned and understands that he need not speak at all, the police *may* exploit his ignorance or stupidity in the detectional process; such a practice is completely consistent with good morals and with the Constitution. *State v. McKnight, supra,* at pp. 250, 251.

The ruling of the Colorado Supreme Court, would, in practice, require the police to take the place of counsel, a role alien to their duties and training. *United States v. Frazier,* 476 F.2d 891 (D.C. Cir. 1973). Since the police could never be certain what facts the suspect was aware of prior to questioning, some officer would be required to correlate all of the facts then known to all of the officers, apply a legal analysis to those facts, determine which could arguably be relevant to the suspect's decision, and advise

the suspect. The officer would be required to tread a narrow and often impossible course: too little information or incorrect information from a non-legally trained officer could result in claims such as the one raised in this case. Too much information could arguably result in the very coercive atmosphere which *Miranda* sought to diffuse: in spite of the warnings, a suspect could feel that it was useless to deny his guilt in the fact of overwhelming evidence. Moreover, a thorough briefing could result in actually undermining the suspect's understanding of his rights: where an officer is required to act initially as his adviser, the suspect may well misunderstand that the police are in an adversary position and that the officer *can and will* use any resulting statement against him. The officer would be required to apply a legal analysis to each statement of the defendant to determine if, in light of all the information known and in light of the law, the suspect had admitted a new crime or suggested a new course of inquiry of which he must be advised. In short, the police would be required to act as counsel, a burden not properly theirs. *Harris v. Riddle,* 551 F.2d 936 (4th Cir. 1977), *cert. denied* 434 U.S. 849.

The alternative would be to have counsel available to every suspect subject to interrogation—but this alternative is already required by *Miranda*. Thus, when a suspect chooses to waive counsel, he has chosen to waive his best opportunity to collect this type of information. This threshold decision is for the suspect to make, and the police should not be required to relieve him from the results of this decision. *United States v. Hall,* 396 F.2d 841 (4th Cir. 1968), *cert. denied* 393 U.S. 918.

Finally, one of the principal advantages of *Miranda* has been the ease and clarity of its application. *Berkemer v. McCarty,* 468 U.S. 420, 430 (1984). It clearly informs police and prosecutors what they must do before conducting a custodial interrogation. *Moran v. Burbine,* 106 S.Ct. 1135, 1143. *Miranda* struck a delicate balance between the duty of the police to effectively enforce the criminal law and the right of suspects to be free from official compulsion. The balance remains correct. Full comprehension of the rights to remain silent and to consult an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process. *Moran v. Burbine, supra.* A rule requiring that the suspect to be aware of the nature of the charges, the elements of the crime, or any other information might leave him better informed about his *situation,* but no better informed about his *rights;* such a rule would not enhance the fifth amendment's protection, but would place an additional, unnecessary handicap on legitimate criminal investigation. Neither the fifth amendment, *Miranda,* nor the public interest requires such a result.[5]

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[5]The vast majority of jurisdictions which have considered the issue have determined that a suspect need not be aware of all of the possible charges he faces in order to execute a valid *Miranda* waiver. *United States v. Burger,* 728 F.2d 140 (2nd Cir. 1984); *United States v. Dorsey,* 591 F.2d 922 (U.S. D.C. Ct. App. 1978); *Harris v. Riddle,* 551 F.2d 936 (4th Cir. 1977), *cert. denied* 434 U.S. 849); *United States v. Anderson,* 533 F.2d 1210 (D.C. Ct. App. 1976); *Collins v. Brierly,* 492 F.2d 735 (3rd Cir. 1974); *United States v. Campbell,* 431 F.2d 97 (9th Cir. 1970); *United States ex. rel Smith v. Fogel,* 403 F. Supp. 104 (N.D. Ill. W.D., 1975); *James v. State,* 230 Ga. 29, 195 S.E.2d 448 (1973); *People v. Merchel,* 46 Ill. Dec. 751, 91 Ill. App. 3d 285, 414 N.E.2d 804 (1980); *People v. Smith,* 108 Ill. App. 2d 102, 246 N.E.2d 689 (1969), *cert. denied,* 397 U.S. 1001; *State*

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CONCLUSION

A waiver of *Miranda* rights is knowing and intelligent if the defendant is aware that he has the right to remain silent, the right to an attorney, and the right to have counsel appointed if he is indigent, and if he is aware that anything he says can and will be used against him. A suspect need not know all of the facts known to or suspected by the police in order to waive: *Miranda* requires that a suspect be made aware of his Constitutional rights, not his circumstances. The Colorado Supreme Court's ruling utterly confuses the law of *Miranda,* which until now has been relatively clear; it upsets *Miranda's* delicate balance, handicapping law enforcement officials with no concomitant benefit to the protection of suspects' fifth amendment rights. For these reasons, the petitioner requests that this Court hold that the Colorado Supreme Court erred in finding that the federal Constitution and *Miranda* were violated here. The petitioner requests that

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v. *Russell*, 261 N.W.2d 490 (Iowa 1978); *Commonwealth v. Griswold*, 5 Mass. App. 764, 358 N.E.2d 482 (1977); *State v. McKnight*, 52 N.J. 35, 243 A.2d 240 (1968); *People v. MacDonald*, 61 A.D.2d 1081, 403 N.Y. Supp. 2d 337 (1978); *People v. Pereira*, 258 N.E.2d 194, 26 N.Y.2d 265, 309 N.Y. Supp. 2d 901 (1970); *State v. Schneider*, 306 N.C. 351, 293 S.E.2d 157 (N.C. 1982); *State v. Woods*, 117 Wis.2d 701, 345 N.W.2d 457 (1984); *cf. United States v. Frazier*, 155 U.S. App. D.C. 135, 476 F.2d 891 (D.C. Ct. App. 1973); *United States v. Hall*, 396 F.2d 841 (4th Cir. 1968); *State v. Rupe*, 101 Wash. 2d 664, 683 P.2d 571 (1984).

the case be reversed and remanded for proceedings consistent with that ruling.

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